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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

PIETRO PARRAVANO, WAYNE HEIKKILA, MARGUERITE DODGIN, EARL CARPENTER, DAVID BITTS, LIZ HENRY, NORMAN L. De VALL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, HUMBOLDT FISHERMEN'S MARKETING ASSOCIATION, CAITO FISHERIES, INC., GOLDEN GATE FISHERMEN'S ASSOCIATION, and SALMON TROLLERS MARKETING ASSOCIATION,

Petitioners,

v.

BRUCE BABBITT, as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, and in his individual capacity; RON BROWN, as Secretary of the UNITED STATES DEPARTMENT OF COMMERCE, and in his individual capacity, and Intervenor SUE MASTEN, member of the Yurok Indian Tribe,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SUE MASTEN IN OPPOSITION

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April 21, 1996

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QUESTION PRESENTED

Petitioners' statement of the questions purportedly presented by the Petition would have this Court grant review on an issue that the District Court specifically declined to decide in the absence of the Yurok and Hoopa Valley Indian Tribes, and which the Court of Appeals never addressed; i.e., quantification of the Tribes' fishing rights that the United States reserved when it established Indian Reservations along the Klamath River. Petitioners also seem to be attempting to resurrect an issue that the Court of Appeals specifically found that Petitioners had abandoned; i.e., whether the Secretary of Commerce's management of ocean salmon harvests so as to make some fish available for on-Reservation harvest by Tribal fishers exercising federally-reserved fishing rights constitutes impermissible racial discrimination.

In fact, there is only one issue involving the federally-reserved fishing rights of the Yurok and Hoopa Valley Tribes that Petitioners properly may present to the Court:

> Do the on-Reservation fishing rights of the Yurok and Hoopa Valley Indian Tribes, having been reserved by Presidential Executive Orders issued pursuant to statutory authorization and confirmed by the Hoopa-

QUESTION PRESENTED - Continued

Yurok Settlement Act, 25 U.S.C. Sec. 1300i, et seq., constitute "any other applicable law" within the meaning of the Magnuson Act, 16 U.S.C. Sec. 1801, 1853(a)(1)(C) and 1854(a)(1)(B), that the Secretary of Commerce lawfully may consider in formulating and implementing plans for the management of the harvest of salmon between three and 200 miles off the coast of Northern California?

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STATUTES INVOLVED

Petitioners omitted from their statement of the statutes and other sources of federal law involved in this case two highly relevant provisions of the Hoopa-Yurok Settlement Act ("HYSA") of 1988, 25 U.S.C. Sec. 1300i, et seq., and included an obsolete version of a third.[1] Those provisions of the HYSA are, respectively:

Sec. 1, 25 U.S.C. Sec. 1300i(b)(1)(G);

Sec. 5, 25 U.S.C. Sec. 1300i-4(e);

Sec.12 , 16 U.S.C. Sec. 460ss-3.

The text of these provisions is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is so rife with gross errors, distortions, omissions and outright misstatements as to render it completely unreliable as the basis for the Court's decision whether to grant the writ sought by Petitioners. These errors begin in the first

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[1] The provisions of the Klamath River Basin Restoration Act, 16 U.S.C. Sec. 460ss-2(c), set forth at p. 92 of Petitioners' Appendix. were amended by Section 12 of the HYSA so as to give both the Yurok and Karuk Tribes seats on the Klamath Fishery Management Council.

paragraph of the Petition and pervade virtually every succeeding paragraph. The most egregious of Petitioners' errors, omissions and/or misstatements are as follows:

1. Paragraph one, page two of the Petition gives the impression that Petitioners have been altogether prohibited from catching salmon in the ocean off the coast of California since April, 1993. This is manifestly false. As the District Court found, and Petitioners agreed, the Secretary of Commerce issued the emergency regulations at issue herein in order to allow the opening of the ocean troll salmon fishery between 3-200 miles offshore.[2]

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[2] "All parties agree that once the Secretary rejected the Council's recommendations, the fishing season, scheduled to open May 1, 1993, could not go forward unless the Secretary promulgated substitute emergency regulations.[fn. omitted]." Petitioner's Appendix, p. 82. Out of concern for the conservation needs of the natural stocks in the Klamath River system (in the preceding three years, spawning escapement levels had been barely one-third of the minimum spawning escapement floor established in the Ninth Amendment to the Framework Management Plan for the salmon fisheries off the coasts of California, Oregon and Washington), and taking into account the projected minimum subsistence harvest by Indian fishers on the Yurok and Hoopa Valley Reservations, the Secretary of Commerce opted to reduce by .5% the lower of two ocean harvest rate options identified by the advisory Pacific Fisheries Management Council ("PFMC"). To attain that objective for the long-term health of the resource, the Secretary merely shortened the ocean commercial troll season by one week, and reduced the quota for the recreational fishery.

2. Contrary to Petitioners' contention at page two, paragraph two of the Petition, the Secretary of the Interior and the Interior Solicitor did not assert that the Indian fisheries within the Reservations along the Klamath River "are entitled to 50% of all chinook salmon from that river." Rather, Interior's actual position was -- and remains -- that,

> ... the fishing rights reserved for the Tribes include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living. I also conclude that the Tribes' entitlement is limited to fifty percent of the harvest in any given year unless varied by agreement of the parties. [Emph. added].

Interior Solicitor's Opinion No. M-36979, October 4, 1993; ER 125, 127. Relying upon the contemporary reports that accompanied the recommendations for establishment of the Reservations, extensive judicial precedent and Interior Department decisions and opinions dating back to 1904,[3] the

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[3] The Interior Solicitor reviewed every significant Interior Department decision, judicial opinion and previous Solicitor's Opinion discussing the purposes of the Reservations and the role of fishing in the lives of the beneficiaries of the Reservations along the Klamath River, beginning with Crichton v. Shelton, 33 I.D. 205, 217 (1904) ("... the prevailing motive for setting apart the [Klamath River] reservation was to secure to the Indians the fishing privileges of the Klamath river"). ER 139-140, notes 27, 28.

Interior Solicitor correctly concluded that,

> "the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others [fn. om.] As against third parties, the Indians' reserved fishing rights were of no less weight because they were created by executive orders pursuant to statutory authority rather than by treaty.[fn. om.] Courts have uniformly rejected a "treaty vs. non-treaty" distinction as a basis for treating Hoopa and Yurok fishing rights differently from the treaty-reserved fishing rights of tribes in other areas of the United States.[fn. om.]

Notwithstanding this position, in 1993 the Secretary of the Interior agreed to limit the Indian in-River harvest to only 45% of the harvestable portion of the run, rather than the 50% that the Yurok Tribe had requested. ER 104. The actual Tribal harvest was about half that amount. Masten's Supplemental Excerpt of Record ("SER") 27.

3. Contrary to Petitioners' characterization in paragraph one, page three of the Petition, the Secretary of Commerce's emergency regulations did not require "that ocean fisheries in an area several hundred miles around the mouth of the Klamath would be closed to fishing on all salmon stocks in an effort to provide this 50% Indian share

plus spawning escapement[.]"[4] Petitioners also are wrong in contending (paragraph one, page three) that the Secretaries of Commerce and Interior "granted" any fishing rights to the Reservation Tribes. As noted above, the fishing rights that the Secretaries recognized had been unequivocally confirmed by the courts in 1976 [Arnett v. Five Gill Nets, 48 Cal.App.3d 454 (1975), cert. denied, 425 907 (1976)], 1981 [Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981)], 1984 [People v. McCovey, 36 Cal.3d 517, cert. denied, 469 U.S. 1062 (1984)], 1986 [United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986)], and 1988 [Mattz v. Superior Court, 46 Cal.3d 355 (1988)], and reconfirmed by Congress in 1988

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[4] Based upon the PFMC's pre-season projections of the 1993 fall run size, and the failure in the previous three years to meet the PFMC's minimum spawning escapement goals, the Secretary's restrictions would have been amply justified even without consideration of the needs of the Tribal in-River fisheries. Of the 55,671 fish that actually escaped ocean harvest to return to the Klamath River in 1993, only 20,880 were wild fish, 15,000 fewer than the spawning escapement floor. The Tribal harvest was only 9,636 fish, about half of the pre-season projection and about 3,000 fewer than the Tribes' emergency subsistence needs. In contrast, the in-River sport fishery harvested 3,587 fish, 132.8% of the pre-season projection. As in previous years since 1978, the Indian in-River harvest was but a small fraction of the total in-River run, and was minuscule in comparison to the actual ocean harvests in those same years. SER pp. 10-15, 21-27.

in the HYSA.[5]

4. Petitioners' assertion, at paragraph three, page three of the Petition, that the Secretaries imposed a "total closure" on the non-Indian fisheries, "while authorizing Indian fishers to use net gear in river spawning areas, illegal for non-Indians," is unsupported by and contrary to the record. Moreover, it completely ignores the fact that because of overharvests in the ocean, the Secretary of the Interior banned all commercial fishing by Reservation Indians between 1978 and 1987 (see, e.g., United States v. Eberhardt, supra), and that between 1934 and 1976, the State of California unlawfully prohibited Reservation Indians from exercising their federally-reserved rights to fish in the Klamath River and other Reservation waters. See, e.g., Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra; Calif. Fish & Game Code Sec. 8434.

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[5] "It is alleged that the 'Square', to be partitioned to the Hoopa Valley Tribe, is much more valuable than the 'Addition' which is to go to the Yurok Tribe. Tribal revenue from the 'Square' is in excess of $1,000,000 annually. Tribal revenue derived from the 'Addition' only totals about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the 'Addition' is also in excess of $1,000,000 a year." H.Rep. 100-938, 100th Cong., 2d Sess., Part 1 (1988), at 20.

5. Contrary to Petitioners' description of the history of the Klamath River's salmon fishery (Petition, pp. 4-5), the non-Indian ocean trollers' total monopoly on commercial salmon fishing began in 1934, when the State of California abolished the Reservation in-River fishery under Calif. Fish & Game Code Sec. 8434.[6]

Non-Indian coastal communities dependent upon the ocean salmon harvest have suffered adverse economic impacts in recent years, but that suffering was inevitable because of calamitous declines in Klamath River salmon stocks due to ocean overharvests and destruction of spawning habitat, not belated federal protection of Indian

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[6] This statute banned the use of gill nets and the sale of fish caught in the Klamath River District. Decades later, after California's courts had acknowledged that Yuroks and other Indians possess federally-reserved fishing rights that the State lacks jurisdiction to regulate or abridge, see Arnett v. Five Gill Nets, supra, the State of California persisted in its efforts to suppress the Tribal fishery by felonizing the sale or possession for sale of salmon taken by gill net in the waters of the Klamath River or its tributaries. Calif. Fish & Game Code Secs. 8685.5, 8685.6, 8685.7. The California Supreme Court's decisions in People v. McCovey, supra, and Mattz v. Superior Court, supra, which both affirmed the substantive existence of the Indians' fishing rights and held that California had no jurisdiction to prosecute Reservation Indians for the off-Reservation sale of fish caught in Reservation waters, arose from the prosecution of Reservation Indians for violating those statutes, among others.

fishing rights. Cases such as United States v. Eberhardt demonstrate that economic losses to non-Indian coastal communities would have begun years earlier and would have been much more severe had the Secretary of Commerce's predecessors not persisted -- over the objections of the Yurok and Hoopa Valley Tribes and the Secretary of the Interior -- in shifting almost the entire burden of conserving the Klamath River's salmon resources to the in-River Tribal fisheries. Petitioners cannot be allowed to so cavalierly ignore either the decades of devastating social, cultural and economic hardships inflicted upon Tribal communities by the previous salmon management policies of the State of California and the Department of Commerce, or the fact that ocean trollers can target different species of fish or transfer their fishing efforts to other areas, while Indian fishers, who can exercise their fishing rights only in Reservation waters, have no such flexibility. Masten's SER 5, 11.

6. Petitioners' statement (at page six of the Petition) that, "The court below projected losses of 89,000 chinook to produce 1,100 additional Indian harvest" is inaccurate, and also ignores the legal and biological imperatives inherent in managing mixed-stock ocean fisheries to protect the weakest natural runs, as required by the Magnuson Act. See, e.g.,

Washington Crab Producers v. Mosbacher, 924 F.2d 1438 (9th Cir. 1990).

In its November 3, 1993 Order, the District Court did not project that any fish actually would be "lost." Rather, the District Court noted only that the ocean fishery would not be able to harvest those fish; nothing in the record or common sense even suggests that the fish that were to be allowed to survive ocean harvest would not be available for ocean harvest in a subsequent season, or escape ocean harvest altogether and thus be available for harvest or spawning in other rivers of origin.

Second, and perhaps more significantly, the District Court specifically found that the Secretary of Commerce was not restricted to using a formal cost-benefit analysis based upon strict numerical comparisons between the number of fish from all stocks escaping ocean harvest and the number of natural spawners likely to return to the Klamath River system in developing his salmon management plans for mixed-stock ocean fisheries. Rather, the District Court held that the Secretary had a rational basis for concluding that preservation of Klamath River-origin natural spawners for future generations would provide the "greatest overall benefit to the Nation" consistent with the requirements of the

Magnuson Act, 16 U.S.C. Sec. 1802(21), and thus that the District Court could not, consistent with the Magnuson Act, substitute its own judgment for that of the Secretary of Commerce. Parravano v. Babbitt, 837 F. Supp. 1034, 1045 (N.D. Calif. 1994).

7. Petitioners' claims that the Department of the Interior does not vigorously enforce its regulations, and that Indians who are not members of either the Yurok or Hoopa Tribes are allowed to exercise Tribal fishing rights (Petition, p. 6, notes 7 and 8) are unsupported by and contrary to the record; indeed, the claims are absolutely false, and Petitioners know it. Also, there is no evidence in the record that the Department of the Interior "allows" Karuk Indians to fish further up the Klamath River, whatever fishing rights the Karuk Tribe may claimed to have lost under the HYSA.

8. Petitioners' account (Petition, pp. 7-8) of the history of the Reservations along the Klamath River omits any mention of the Acts of March 3, 1853 (10 Stat. 226, 238) and March 3, 1855 (10 Stat. 686, 699), which authorized the President to issue the 1855 executive order establishing the original Klamath River Reservation for Indian purposes. Mattz v. Arnett, 412 U.S. 481(1973). Petitioners also fail to mention that all three of the Executive Orders by which the

Reservations along the Klamath and Trinity Rivers first were established for Indian purposes were based upon proposals that described the territory and the abundance of fish upon which the Indians depended for their sustenance. See, e.g., I Kappler, Indian Laws and Treaties 816; see also, Mattz v. Arnett, supra.[7]

Petitioners accurately note that in Mattz v. Arnett, supra, this Court ordered that the issue of Indian fishing rights be addressed on remand, but incorrectly describe either the immediate outcome on remand, or subsequent judicial decisions confirming that outcome. The State of California argued on remand that it had jurisdiction to regulate fishing by Tribal members in Reservation waters under 18 U.S.C. Sec. 1162 (P.L. 83-280), because that statute exempted from State jurisdiction only hunting and fishing rights based upon treaties, statutes or agreements, not executive orders.[8] The

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[7] "The site was ideally selected for the Yuroks. They had lived in the area; the arable land, though limited, was 'peculiarly adapted to the growth of vegetables,' [cit.om.]; and the river, which ran through a canyon its entire length, abounded in salmon and other fish." Id., at 487.

[8] 18 U.S.C. Sec. 1162(b) provides that,
"Nothing in this section ... shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or

California Court of Appeal expressly rejected that argument, holding that the fishing rights of the Indians of the then-unified Hoopa Valley Reservation were traceable to the statutes that had authorized the President to create Reservations "for Indian purposes," and thus that the Indians' fishing rights were based on statute for the purposes of P.L. 83-280. For that reason, the court declined to decide whether an executive order was an "agreement" within the meaning of P.L. 83-280.

This Court proceeded to deny the State's petition for a writ of certiorari. Arnett v. Five Gill Nets, 48 Cal. App. 3d 454 (1974), cert. denied, 425 U.S. 907. In subsequent cases in which the State of California and others made essentially the same arguments that Petitioners are making here, the reasoning and result in Arnett v. Five Gill Nets consistently has been confirmed. See, e.g., Blake v. Arnett, supra, People v. McCovey, supra, United States v. Eberhardt, supra, and Mattz v. Superior Court, supra.[9] In the HYSA,

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regulation thereof."

[9] People v. McCovey and Mattz v. Superior Court both involved prosecution of Yuroks for the off-Reservation sale of fish caught in Reservation waters. Petitioners' casual dismissal (Petition, p. 22) of the significance of these and the other cited cases is as inexplicable as it is indefensible.

Congress concurred the courts' conclusions.

Petitioners' claim that the HYSA does not mention fishing rights (Petition, page 9), is extremely misleading. Although the statute does not use the phrase "fishing rights," it clearly refers to funds derived from commercial fishing [25 U.S.C. Sec. 1300i(b)(1)(g)], and the legislative history specifically enumerates valuable Tribal interests in the Klamath River fishery as among the assets of the Reservation being partitioned; indeed, Congress considered those rights to comprise the principal value of the Yurok Reservation. S. Rep. 564, 100th Cong., 2d Sess. at 2, 25-26 (1988); H.Rep. 938, P.t. 1, 100th Cong., 2d Sess. at 20 (1988); see also, 25 U.S.C. Sec. 1300i-1(b) and (c). Moreover, Section 12 of the HYSA, codified at 16 U.S.C. Sec. 460ss-3, grants the Yurok Tribe representation on the Klamath River Basin Task Force.

Proceedings Below.

By their Amended Complaint in this action, Petitioners sought, inter alia, a judgment declaring that the Yurok and Hoopa Valley Indian Tribes have no federally-reserved right to fish in the waters of their Reservations; enjoining the Secretary of Commerce from considering the federally-reserved on-Reservation fishing rights of the Yurok

and Hoopa Valley Tribes as "any other applicable law" which the Secretary of Commerce could consider in regulating the ocean harvest of salmon under the Magnuson Act; and enjoining the Secretary of the Interior from allowing members of the Yurok and Hoopa Tribes to fish in the waters of their own Reservations. Amended Complaint, ER 99-102.[10]

Sue Masten is a member of the Yurok Tribe whose family has sustained itself for generations by fishing in the lower Klamath River on what now is part of the Yurok Indian Reservation, and who continues to fish in those waters for economic, ceremonial and cultural purposes. Ms. Masten moved to intervene and to dismiss under F.R.Civ.P. 19, based upon Petitioners' failure to join the Yurok Tribe as an indispensable party to an action to quantify Tribal fishing rights.

The District Court granted Ms. Masten's motion to

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[10] Petitioners prayed for orders declaring, "that the proposed allocation of fish away from Plaintiffs to 'in-river Indian' Klamath River fisheries are illegal and unconstitutional[,]" and "Enjoining Babbitt and others acting in concert with him, including those fishing pursuant to Interior regulations adopted for Klamath River fisheries from any fishing in the Klamath River which would take salmon necessary for spawning escapement as determined by the PFMC." ER 100-101.

intervene, but denied her motion to dismiss on the grounds that the Court specifically refused to allow the quantification of the Tribal rights in the Tribes' absence. Pet. App. at 22, n. 3. Petitioners fail to mention Masten's intervention, the District Court's determination that the Yurok and Hoopa Tribes would be indispensable parties to any action to quantify their federally-reserved fishing rights, and that Petitioners did not appeal from the District Court's ruling on the indispensability of the Tribes.

ARGUMENT

Petitioners purport to posit six reasons for granting their Petition.[11] Because the first five of Petitioners' stated

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[11] In Petitioners' own words, the reasons are:

1. Indian Treaty Rights are Special and May Not Be Implied;

2. Conflicts or Inconsistent Circuit Court Decisions;

3. The Court Expressly Adopts A Rule of Construction at Odds with This Court's Precedents;

4. The Decision Contradicts Long-Standing Administrative and Congressional Interpretation;

5. The Lower Court's Decision Destroyed the Livelihood of Fishermen and Coastal Communities and Wasted Salmon; and

6. Numerous Tribes in the Ninth Circuit Have Similar Claims, Affecting All Pacific Ocean Fisheries. The Court of Appeals erred in holding that the Magnuson Act allows the Secretary of Commerce to consider on-Reservation fishing rights reserved by executive orders issued pursuant to statutes are entitled to the same consideration as treaty-based off-Reservation fishing rights.

reasons for review inaccurately portray the decision of the Court of Appeals, and because the sixth lacks legal significance under the Magnuson Act, there is no cognizable reason why the Petition should be granted.

A. The Court of Appeals properly applied existing precedent from this Court and other federal courts in concluding that the statutes and Executive Orders upon which the on-Reservation fishing rights of the Yurok and Hoopa Valley Tribes are based constitute "any other applicable law" within the meaning of the Magnuson Act.

The fundamental flaw in Petitioners' attack on the decision of the Court of Appeals is Petitioners' rigidly myopic and erroneous equation of the Magnuson Act's references to "any other applicable law" to "Indian treaty fishing rights," 16 U.S.C. Secs. 1853(a)(1), (a)(2), and 1854(A). That the two phrases are not synonymous is obvious not only from the plain language of the Magnuson Act and the context in which the phrases appear, but also from previous authoritative interpretations of these phrases by the Court of Appeals.

The Magnuson Act grants the Department of Commerce broad regulatory authority over commercial and

recreational fishing in coastal waters, on or near the Continental Shelf appertaining to the United States, and on the high seas from three to 200 miles offshore. 16 U.S.C. Sec. 1801(a), (b). The Magnuson Act does not grant the Department of Commerce any regulatory authority over Indian or non-Indian in-River fisheries, even if the fish involved are anadromous and Indians are fishing in the exercise of federally-reserved fishing rights. Washington Crab Producers v. Mosbacher, supra; Pacific Coast Federation of Fishermen's Associations v. Secretary of Commerce, 494 F.Supp. 626 (N.D. Calif. 1980); see also, United States v. Eberhardt, supra.

16 U.S.C. Sec. 1853 specifies the required and discretionary contents of any fishery management plan prepared by a Fisheries Management Council or by the Secretary of Commerce with respect to any fishery within the jurisdiction of the Secretary of Commerce. Section 1853(a)(1)(C) requires any such plan to "contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are -- ... (C) consistent with the national standards, the other provisions of this Act, and any other applicable law. [emph. added]." Section 1853(a)(2) requires the plan to

"contain a description of the fishery, including, but not limited to, ... the nature and extent of foreign fishing and Indian treaty fishing rights, if any." 16 U.S.C. Sec. 1854(a) requires that the Secretary of Commerce, after receiving a fishery management plan (or amendment to a plan) prepared by a Fishery Management Council, "immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law[.]"

In Washington Crab Producers v. Mosbacher, supra, the Court of Appeals exhaustively analyzed both the meaning of the Magnuson Act language at issue in this case, and the proper role of the courts in reviewing the Secretary of Commerce's ocean fishery management decisions. As to the latter, the Court of Appeals stressed that a decision of the Secretary of Commerce may not be overturned unless it is arbitrary, capricious, an abuse of discretion or otherwise contrary to law ("Our only function is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choice made.' [Cit. om.]" Id., at 1441.

As to the meaning of "any other applicable law," the Court of Appeals held that the phrase includes any other law

that could impact the resource -- in the ocean or elsewhere:

> "Applicable law on conservation and management holds that '[n]either the Indians nor the non-Indians may fish in a manner so as to destroy the resource or preempt it totally.'" Id., at 1445.

Finally, the Court of Appeals held that "Indian treaty fishing rights" as used in 16 U.S.C. Sec. 1853(a)(2) means ocean -- i.e., off-Reservation, and thus necessarily treaty-based -- Indian fishing rights that must be described (and accommodated) by the Secretary of Commerce ocean fishery management plans. Defining "Indian treaty fishing rights" in such a manner is perfectly consistent with considering and accommodating harvests under on-Reservation fishing rights based upon statutorily-authorized Executive Orders to be "any other applicable law" when developing and evaluating ocean fishery management plans. Indeed, formulation of effective management measures for the ocean fishery is impossible without considering the projected impact on anadromous fish stocks of the in-River exercise of reserved Tribal fishing subject to the jurisdiction of Tribal governments or the Department of the Interior. Washington Crab Producers v. Mosbacher, supra.

B. The decision of the Court of Appeals is completely consistent with the decisions of other federal Circuits.

Petitioners' contention that the decisions of two other Circuits "conflict in principle" (Petition, p. 19) with the decision of the Court of Appeals in this case is nothing more than a desperate attempt to create the illusion of a conflict among federal circuits where no such conflict exists. Petitioners' reference to Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995), is mystifying, because that case did not involve the existence, nature or scope of an on-Reservation natural resource right, nor did it determine that reserved rights based on executive orders differ from such rights based on treaties.[12]

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[12] "The Tribes' claim to a water right in this case did not pertain to land within its Reservation boundaries, nor, so far as we can tell, did the claim derive from the government's withdrawal of land from the public domain and its reservation for a particular purpose. The Tribes' claim dealt instead with the 'unoccupied lands of the United States so long as game may be found thereon,' and the Tribes' treaty right to 'hunt' on those unoccupied lands outside its Reservation... The question is whether federal courts have the authority to force the United States to pursue this claim on the Tribes' behalf." 56 F.3d at 1480. The Circuit Court held without a treaty provision or statute specifically or implicitly obligating the United States to assert and pursue the claim, the Attorney General's decision not to pursue the Tribes' claim was within her discretion, and thus not subject to judicial review.

Petitioners' reference to Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995), is equally baffling. That case involved interpretation of a treaty provision temporarily reserving the right of Tribal members to hunt on public lands outside the boundaries of their Reservation, not a permanent on-Reservation right reserved by an executive order issued pursuant to statutory authorization. Thus, the result in that case has no application here.

Petitioners' argument that the "Equal Footing" doctrine precluded the United States from making any post-Statehood reservation of on-Reservation natural resource rights for Indian beneficiaries has been rejected by this Court as a general proposition, see, e.g., Arizona v. California, 373 U.S. 546 (1963), decree entered 376 U.S. 340 (1964), modified 439 U.S. 419 (1979), further modified 460 U.S. 605 (1983), and by numerous other courts in the specific context of the reserved fishing rights of the Indians of the Reservations along the lower Klamath River. Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra.

C. The Court of Appeals applied the proper canon of construction to the statutes and executive orders creating the Yurok and Hoopa Valley Reservations.

Ignoring the fact that the Executive Orders creating the Klamath River and Hoopa Valley Reservations were issued pursuant to express statutory authorization, and that Congress subsequently confirmed the fishing rights of the Yurok and Hoopa Valley Tribes in the HYSA, Petitioners fault the Court of Appeals for applying to those Executive Orders the same rule of construction as this Court consistently has applied to the interpretation of treaties and statutes; i.e., that ambiguities are to be construed in the manner most beneficial to the Indians so as to effectuate the purposes for which the Reservations were created.

This case does not require the Court to decide what the rule of interpretation should be for executive orders unanchored in statutory authorization, because the rights at issue in this case already have been found to be anchored in statute. Mattz v. Arnett, supra; Blake v. Arnett, supra; Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra; United States v. Eberhardt, supra. This Court consistently has interpreted statutes intended to benefit Indians according to the same rules of construction as

it has applied to treaties with Tribes. See, e.g. Antoine v. Washington, 420 U.S. 194 (1975); Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The Court of Appeals cannot be faulted for adhering to those same principles in order to give effect to the purposes for which the Reservations were created. Donnelly v. United States, 228 U.S. 243, modified on rehearing, 228 U.S. 708 (1913);[13] Arnett v. Five Gill Nets, supra.

D. The decision of the Court of Appeals is consistent with administrative and Congressional interpretations of both the Magnuson Act and the statutes and Executive Orders creating the Yurok and Hoopa Valley Reservations.

When the State of California petitioned this Court for review of the decision of the California Court of Appeal on remand in Arnett v. Five Gill Nets, supra, Solicitor General

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[13] In its original decision in Donnelly, the Court held that several California statutes had declared the Klamath River to be non-navigable, thus conveying title to the bed of the Klamath River to the United States. On rehearing, the Court, "recall[ed] so much of the opinion as holds that 'by the acts of the legislation mentioned, as construed by the highest court of the state, *** California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact, it be a navigable river." That matter, therefore, we leave undecided." 228 U.S. at 711-712.

Bork made the following argument to this Court in opposition to the State's petition:

> That executive orders played a prominent role in the creation of the [Hoopa Valley] Reservation does not change this result. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the Tribe...
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Pet. App. 10-11.

Shortly after this Court denied the State's petition for a writ of certiorari in Arnett v. Five Gill Nets, the Secretary of the Interior promulgated initial interim regulations to govern Indian fishing in the waters of the unified Hoopa Valley Reservation. Those regulations, now codified at 25 C.F.R. Part 250, originally allowed limited commercial fishing, but in 1978 the Secretary imposed a "moratorium" on commercial fishing that lasted for nine years, even though Interior's regulations bemoaned the Secretary of Commerce's failure to curtail the overharvest of Klamath River salmon in ocean waters). See, People v. McCovey, supra; United States v. Eberhardt, supra; Mattz v. Superior Court, supra. Thus, Petitioners clearly are wrong to suggest

that the decision of the Court of Appeals is inconsistent with the position consistently articulated by the Secretary of the Interior for nearly twenty years.[14]

Although the Secretary of Commerce was much slower to meaningfully accommodate the reserved fishing rights of the Tribes along the Klamath River (the PFMC has been slower still), Petitioners cannot deny that the Department of Commerce recognized and even accommodated the existence of those rights to some extent. Petition, p. 24. See also, Pacific Federation of Fishermens' Associations v. Secretary of Commerce, supra. Moreover, the Secretary of Commerce consistently has taken the position that the Magnuson Act requires that ocean harvests

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[14] Petitioners also are incorrect in ascribing to the Solicitor and to the Court of Appeals reliance upon Washington v. Fishing Vessels Association, 443 U.S. 658 (1979), and Washington State Charterboat Association v. Baldridge, 702 F.2d 820 (9th Cir. 1983), for their respective determinations that Tribal fishing rights exist. The Solicitor used Washington v. Fishing Vessels Association "moderate living" standard for guidance in quantifying the Tribes' reserved rights, but the Court of Appeals did not cite that case at all. The Court of Appeals relied upon Washington Charterboat Association v. Baldridge only for its determination that the Magnuson Act was not intended to abrogate or modify Tribal fishing rights, and thus that the Secretary could treat such rights as "other applicable law" whether such rights are based on treaties or executive orders issued pursuant to statute.

of salmon must be managed to protect the weakest natural runs in each river to which salmon return to spawn,[15] even if the result is that off-Reservation ocean treaty Indian fishers occasionally may harvest more than their fair share of fish in a particular season. See, Washington Crab Producers v. Baldridge, supra. The Secretary of Commerce did nothing different in this case.

E. Any decline in Petitioners' economic welfare is attributable to declines in salmon resources, not the decision of the Court of Appeals.

As already noted, the precarious condition of the Klamath River's natural salmon resources going into the 1993 season would have justified severe curtailment the ocean harvest of salmon even if there had not been an Indian fishery in the Klamath River. As Judge Beezer made clear in his concurrence in the judgment in United States v. Eberhardt, supra, ocean overharvest and habitat destruction had forced Interior to suppress the Tribal harvest out of concern for the long-term survival of the resource.

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[15] If a given river's run is managed based on hatchery production, rather than natural spawners, the run can withstand more intensive harvest in the short term, but because hatchery fish are less genetically diverse and thus more susceptible to disease and other infirmities, over time the quality of hatchery runs will decline.

F. Because the decision of the Court of Appeals is consistent with existing precedent, there is no reason to grant the Petition simply because other Tribes may cite that decision in support of their own claims.

As their final reason for granting their Petition, Petitioners raise the specter of numerous Tribes in the Pacific Northwest and Alaska asserting new claims to allocations of salmon, thus throwing existing allocation schemes into total disarray. There are three obvious responses to this assertion.

First, this Court has no basis (other than Petitioners' notoriously unreliable representations) upon which to determine whether the other cases are even remotely analogous. Second, Petitioners have offered no authority for their contention that claims by Alaskan Native Villages will have any impact upon the Secretary of Commerce's discharge of the duties imposed under the Magnuson Act, and Petitioners have not considered the effect of 43 U.S.C. Sec. 1603 and/or 43 U.S.C. Sec.1618 on any such potential claims.

Third, if the cases mentioned by Petitioners ever produce the chaos that Petitioners predict, this Court undoubtedly will have ample opportunity to review the questions actually presented by those cases. To review the

decision of the Court of Appeals in this case in anticipation of cases that may never arise would be a premature waste of judicial resources.

CONCLUSION

When Congress authorized the President to establish reservations "for Indian purposes" along the Klamath River nearly 150 years ago, salmon were almost as necessary to the survival of Sue Masten's Yurok ancestors and Indians in the region as the very atmosphere they breathed. Much the same can be said today, but for more than half a century, Yuroks and other Indians of the Reservations along the Klamath River have been economically, socially and spiritually suffocated by the federal government's failure to protect either the Indians' fishing rights or the resources upon which the meaningful exercise of those rights depends.

The decision of the Court of Appeals gives Ms. Masten and other Tribal members some measure of assurance that at long last their rights and needs will be recognized and fairly accommodated. No reason exists in law, logic or justice to disturb the decision of the Court of Appeals that the federally-reserved fishing rights of the Yurok and Hoopa Valley Tribes constitute "any other applicable law" that the Secretary of Commerce must

consider in managing the ocean harvest of salmon off the coast of northern California. Accordingly, the Petition should be denied.

DATED this 21st day of April, 1996.

Respectfully submitted:

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APPENDIX

25 U.S.C. Sec. 1300i. Short title and definitions

(a) Short title

This subchapter may be cited as the "Hoopa-Yurok Settlement Act".

(b) Definitions

For the purposes of this subchapter, the term--

(1) "Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary in the accounts entitled--

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056";

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001";

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, Tish-Tang-Atan,

South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 1300i-1(b) of this title;

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as the Hoopa Valley Reservation in section 1300i-1(b) of this title and the Yurok Reservation in section 1300i-1(C) of this title.

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 1300i-3 of this title;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 1300i-4 of this title;

(11) "Short cases" means the cases entitled Jesse Short et al. v. United States, (Cl. Ct. No. 102-63); Charlene Ackley v. United States, (Cl. Ct. No. 460-78); Bret Aanstadt v. United States, (Cl. Ct. No. 146-85L); and Norman Giffen v. United States, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the Short cases;

(13) "trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation;

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 1300i-1(C) of this title; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 1300i-8 of this title.

102 STAT. 2935, PUBLIC LAW 100-580 -- OCT. 31, 1988, 16 U.S.C. Sec. 460ss-3:

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.--Section 4(C) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss-3) is amended--

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with he first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) SPECIAL RULE.--The initial term of the representative appointed pursuant to section 4(C) (11) and (12) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of the members of the Task Force then serving.

Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.